

Arms Trade Treaty (ATT) Negotiations Where we have been and the road ahead

Elizabeth Kirkham¹, November 2012

The UN ATT process

The UN ATT process was initiated by the UN General Assembly (UNGA) in December 2006 by way of Resolution 61/89. This mandated the UN Secretary General (UNSG) to seek the views of states on the “feasibility, scope and parameters of a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms” and, further, to establish a UN Group of Governmental Experts (GGE) to look into the issue. Following the tabling of the GGE Report at the 2008 UNGA a further Resolution (63/240) mandated the establishment of an Open-Ended Working Group before a third UNGA Resolution was passed in January 2010 (64/48) which replaced the mandate for the OEWG with one in favour of convening Preparatory Committee Meetings and a four week UN Conference on the Arms Trade Treaty in 2012.

Three sessions of Preparatory Committee meetings were held between July 2010 and July 2011 during which substantive issues were discussed; a fourth Preparatory session was held in February 2012 during which procedural matters were addressed. The discussions on rules of procedure for the ATT Conference were controversial and protracted with opinion split between states who wanted decisions on matters of substance to be agreed by consensus and those who favoured adoption of standard UN General Assembly Rules of Procedure (which allow a vote in the event that consensus cannot be reached). Ultimately pressure from, among others, the United States ensured that the July Diplomatic Conference (DipCon) would be governed by consensus decision-making.

Throughout the many and varied aspects of the UN ATT process the deliberations and discussions amongst states were skilfully Chaired by Ambassador Roberto Garcia Moritàn of Argentina who managed the myriad views and interests and presided over a UN ATT Diplomatic Conference (DipCon) that, contrary to most expectations, came close to delivering an ATT.

The ATT DipCon

The UN Conference on the Arms Trade Treaty took place from 2-27 July 2012 during which time states engaged in extensive discussions covering all aspects of the prospective Treaty. Part of the first week was intended to be given over to a “High Level Segment” where Government Ministers and high-ranking officials were to present their vision for an ATT. However the opening few days were stalled by a dispute that was raised over the status of Palestine which took some days to resolve. By the start of week 2 negotiations began in earnest with the key areas of discussion split between two Main Committees: Main Committee 1 addressed the Preamble/Principles, Goals and Objectives, and Criteria; Main Committee 2 addressed the Scope, Implementation and Final Provisions. Although the agreed rules of procedure had stated that the Main Committees be designated “open”, a decision was taken to close 50% of these meetings, meaning that these discussions were not accessible to civil society representatives. Additional closed sessions were also held during weeks 3 and 4, including at night time and during the weekend.

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Rather than producing a full draft Treaty as the basis for the negotiations the DipCon President chose to distribute, on 3 July, a paper – the third version since July 2010 – outlining what he saw as the key elements of the prospective Treaty. The discussions that took place in the Main Committees began by considering the Chair's text of 3 July; subsequent to this the two Main Committee Chairs produced revised papers on each of the constituent elements seeking to reflect the balance of the discussions that had taken place.

Key aspects of the debate

There were many areas of controversy and debate throughout the period of the substantive negotiations with all aspects of the potential Treaty coming under close scrutiny by government delegations. For example, extensive discussions took place on the issue of the Goals and Objectives of the Treaty that centred upon the relative importance of preventing the illicit trade in conventional arms over humanitarian objectives and international law. The discussions on the Scope of the Treaty were amongst the most complex with key debates centring upon both the categories of weapons to be included and the definitions of activities to be addressed by the Treaty. In the former case, the most protracted debate concerned the status of ammunition and whether it should be included in the scope. The most strident opposition to this came from the United States who argued that the sheer volumes involved in ammunition transfers along with the inherent potential for diversion meant that it could not be controlled in the same way as could conventional weapons. On the other hand many African and Caribbean states were adamant that a Treaty that did not control ammunition transfers would not be fit for purpose.

The issue of transfer criteria was another hotly debated topic. From an early stage in the negotiations different levels of control were articulated with a first tier comprising “prohibitions” on transfers deemed contrary to international law. Exactly what activities should be considered illegal was a matter for some debate; various drafts of text suggested a variety of different prohibitions including against transfers in breach of international humanitarian law, against transfers that might be used to contravene UN arms embargoes or to commit international crimes and against transfers that might be used in violation of international commitments relating to the prevention of terrorism.

A second tier of controls envisaged states undertaking a risk assessment prior to authorising a transfer of conventional arms and which would involve assessing the likelihood of a transfer contributing, for example, to violations of human rights and international humanitarian law. Extensive debate focussed on the threshold beyond which a state would be required to refuse a transfer because of a perceived risk of such negative outcomes; some, such as the European Union, argued that this should be based on existence of a “substantial” risk while others favoured a higher threshold.

A third tier of controls was also discussed with a range of potential factors – such as the risk of corrupt practices or the impact on sustainable development – that would be taken into consideration as part of the arms transfer process. In addition there was also significant debate concerning the inclusion, in the criteria section, of reference to mitigation measures that might be taken by exporting and importing states in order to reduce the risks of adverse consequences arising from an export of conventional arms. The inclusion of such provisions appeared to be particularly important to states that considered themselves, first and foremost, to be importers of conventional arms (as opposed to exporters).

Discussions on sections relating to Implementation and Final Provisions were slightly less controversial. However extensive discussions were held in relation to reporting requirements, in particular with regard to the feasibility and desirability of including reporting on all types of transfers (as opposed to only exports) and also of including ammunition and parts and components within the reporting scheme. Provisions for entry into force were also extensively debated with the vast majority of states advocating the establishment of a quantitative threshold (ranging from 30 to 100 states) and a small minority seeking inclusion of a qualitative element (for example entry into force following signature and ratification on the part of the “top ten” arms exporters and the “top ten” arms importers).

The final draft text

The full draft text (CRP.1) that was ultimately tabled by Ambassador Moritàn on the penultimate day of the DipCon was undoubtedly intended to reflect the balance of the discussions that had taken place over the preceding three weeks. This 26 July text appeared to be broadly welcomed as an improvement on the first consolidated text that had been circulated two days previously. Whilst many delegations felt that further improvements were needed, the sense of being “nearly there” was palpable. Among the main positive elements of CRP.1 were:

- Clear goals and objectives that clearly state that the purpose of the ATT is to prevent human suffering.
- A scope that includes small arms and light weapons, that is, those weapons that are responsible for most deaths due to armed violence.
- A requirement that, as part of the arms export decision-making process, states undertake an assessment based on the risk that a transfer could be used to facilitate human rights and humanitarian law violations or terrorist acts.
- A requirement that states should consider how to avoid the possibility that potential arms exports may: have an adverse impact on development; contribute to gender-based violence or violence against children; become subject to corrupt practices; or be used in transnational crime.
- A requirement that states report on arms transfers under the scope of the Treaty and on steps they take to implement the Treaty.
- The establishment of a Secretariat to assist states parties in the “effective implementation of the Treaty.”
- Dispute settlement provisions that allow for the possibility of arbitration.

On the other hand the principal weaknesses that were identified included:

- A scope that explicitly includes major conventional weapons only to the extent specified under the categories of the U.N. Register of Conventional Arms, allowing states, if they wish, to exempt significant quantities of military equipment from control.
- The failure to include ammunition and parts and components in the scope with these crucial items being controlled for export only based on risk factors relating to human rights and humanitarian law while being excluded from considerations pertaining to diversion, development, gender-based violence and violence against children, corruption and transnational crime.
- The failure to include the potential for the diversion of arms within the risk assessment criteria.
- The requirement that a refusal to authorize an arms transfer because of the risk of undermining human rights and humanitarian law be based on an “over-riding risk” as opposed to a “substantial” or “significant” risk, thereby setting the bar unrealistically high.
- The assertion that the implementation of the treaty should not prejudice obligations with regard to other instruments potentially allowing states to enter into agreements that undermine the treaty; and the associated possibility that arms transfers that are classified by states as “defence co-operation agreements” would be exempt from the Treaty’s provisions.
- Reporting requirements that do not include ammunition or parts and components, that allow states to submit as much or as little information as they wish, and that do not provide for information to be made publicly available.
- A requirement that 65 states must ratify the Treaty before it enters into force, meaning it could be many years before the Treaty is operational.
- Amendment provisions that will be constrained by the requirements of consensus decision-making.

No agreement

Unfortunately the DipCon was prevented from attempting to discuss and explore a way forward in resolving these problems by an intervention on the morning of 27 July by the US delegation during which they asked for “more time” to consider the text. The requirement that the Treaty be agreed

by consensus meant that, at this point, the DipCon was effectively halted in its tracks with no prospect of achieving agreement at that time. This turn of events appeared to take almost all delegations by surprise with most seemingly prepared for a last final push towards agreeing an ATT.

The last hours of the July 2012 DipCon were marked by a succession of interventions by delegations from all regions expressing their disappointment and a desire to conclude matters at the earliest opportunity. Most notable of these was a statement by over 90 states, delivered by Mexico, in which they expressed disappointment and frustration at being denied the opportunity to reach agreement and a willingness to try to finalize matters through the UNGA.

Next steps

Following the conclusion of the 2012 DipCon attention switched to the First Committee of the UN General Assembly where many states sought to build upon the momentum that was generated in July. On 23 October a draft Resolution was tabled by Costa Rica on behalf of the seven states that had co-authored the previous three UNGA Resolutions on the ATT². This Resolution (L.11) was passed overwhelmingly by vote in the First Committee on 7 November³ and which included both China and the US voting in favour; the passage of this resolution has now paved the way for a final round of ATT negotiations from 18-28 March 2013 with the draft text from the first DipCon – CRP.1 – agreed as the basis for the discussions. Unfortunately the Resolution also requires that the March 2013 Conference be held under the same rules of procedure as was the July 2012 meeting, meaning that all decisions on matters of substance must be reached by consensus. This presents the continuing possibility that one (powerful) state or a small group of states may seek to block agreement if they consider that a proposed Treaty is not in their interests. The Resolution does however require the UNG to “remain seized of the matter during its current session” and requests that the President of the March 2013 DipCon report to the UN General Assembly as soon as possible after the close of the negotiations. This raises the possibility that, should the final negotiations fail to produce a result then the matter can swiftly be taken up by the UNGA where the wishes of the majority of states who wish to see a robust treaty can prevail.

Conclusion

It is clear that the constraints of consensus decision-making coupled with the significant list of problematic issues raised by CRP.1 means that the negotiators of the March 2013 DipCon will have a sizeable task on their hands. Substantial issues remain to be worked through including:

- Whether the scope of the draft text can be broadened so as to include a comprehensive range of military equipment, ammunition, parts and components;
- Whether the export criteria can be revised in order to ensure that a serious risk of diversion is considered grounds for refusing a transfer, that the risk assessment is conducted on the basis of a realistic and meaningful threshold, and that concerns relating to corruption, development, gender-based violence and violence against children are considered prior to authorising an export;
- Whether serious loopholes that place “other instruments” and “defence co-operation agreements” above the provisions of the draft treaty can be removed.

Encouragingly there appears to be significant support for addressing some, if not all, of these weaknesses, and while the constraints of consensus decision making will mean that tough negotiations are ahead, there is no doubt that resolving such issues will be the key to a successful outcome in March 2013 and the achievement of a robust and effective ATT.

² The seven co-author states are: Argentina, Australia, Costa Rica, Finland, Japan, Kenya and the United Kingdom.

³ UN General Assembly First Committee Resolution A/C.1/67/L.11 was passed as follows: The Resolution as a whole was passed 157 in favour, none against and with 18 abstentions (157-0-18); Operative Provision 2 which addressed the issue of the March 2013 Conference being considered “Final” was passed 153-1(Iran)-18; while Operative Provision 3 which designates CRP.1 as the basis for the March negotiations was passed 148-1(Iran)-22. For further details see <http://www.reachingcriticalwill.org/disarmament-fora/2012/resolutions>